

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

THOMAS L. REED, SR.,

Plaintiff,

v.

MILLCREEK POLICE, et al.,

Defendants.

Civil Action No. 08-154 Erie

MEMORANDUM ORDER

This civil rights action was received by the Clerk of Court on May 21, 2008, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation [ECF No. 82], filed on November 4, 2010, recommended that the Defendants' motion for summary judgment [ECF No. 63] filed by Millcreek Police Department, and Millcreek police officers Shawn Wills, Benjamin Bastow, Officer Mays and Lieutenant Lucas be granted. Specifically, the Magistrate Judge recommended that:

1. The motion be granted with respect to the Millcreek Police Department for failure to state a viable municipal liability claim;
2. The motion be granted with respect to the Plaintiff's Eighth Amendment excessive force claim against Millcreek police officers Shawn Wills, Benjamin Bastow, Officer Mays and Lieutenant Lucas, since the evidence of record established that the Plaintiff's head injury was either self-inflicted or accidental; and
3. The motion be granted with respect to the Plaintiff's race discrimination/equal protection claims for failure to state a claim upon which relief may be granted.

[ECF No. 82]. The parties were allowed fourteen (14) days from the date of service to file objections. Plaintiff filed objections on November 10, 2010 [ECF No. 83].

The Court adopts the Report and Recommendation with respect to the claims against Defendant Millcreek Police Department and the Plaintiff's race discrimination/equal protection claims, and the motion will be granted with respect to

these claims. The Court declines to adopt, however, the Magistrate Judge's Report and Recommendation wherein she recommends that the Plaintiff's Eighth Amendment excessive use of force claim against the individual Defendants be dismissed. The Court finds, after an independent review of the record, and after oral argument on the Plaintiff's objections to the Report and Recommendation, that there are material issues of fact which preclude summary judgment. Specifically, these involve disputes as to whether the Plaintiff's head injury was self-inflicted, occurred accidentally while being carried by the individual Defendants, or was inflicted intentionally by one or more of the individual Defendants. Therefore, the motion will be denied with respect to this claim.

AND NOW, this 28th day of January, 2011;

IT IS HEREBY ORDERED that the motion for summary judgment [ECF No. 63] filed by the Defendants is GRANTED in part and DENIED in part. The motion is GRANTED with respect to the claims against Millcreek Police Department and with respect to the Plaintiff's race discrimination/equal protection claims. The motion is DENIED with respect to the Plaintiff's Eighth Amendment excessive force claims against the individual Defendants.

IT IS FURTHER ORDERED that the Clerk of Courts terminate the Millcreek Police Department as a Defendant from this action.

s/ Sean J. McLaughlin
United States District Judge

cm: All parties of record
Susan Paradise Baxter, U.S. Magistrate Judge